Reasons for Granting Writ.

This case involves the application of the act of state doctrine to Ordinance No. 23 of the Republic of Iraq, a recognized foreign government, confiscating property of the Iraqi ex-Dynasty as its wealth had been wrongfully acquired. The Court below refused to recognize Ordinance No. 23 on the ground that it was confiscatory and that giving extraterritorial effect to such decrees was contrary to public policy.

As to the personal property here of the late King Faisal II, the question is not giving extraterritorial effect to the decree but, rather, giving effect to the decree as to a wholly internal matter of Iraq—the privilege of a deceased person domiciled in that Country to transmit personal property upon death. The distribution of the personal property here is not governed by the situs of the property but by the law of the domicile of the deceased which, in this case, is Ordinance No. 23.

1. The decision below is in conflict with the decisions of this Court giving extraterritorial effect to foreign decrees of confiscation.

In *United States* v. *Belmont* (1937), 301 U.S. 324, a Russian corporation had a deposit in New York with August Belmont, private banker. In 1918 the Soviet Government decreed the termination of the corporation and appropriated its assets wherever situated. This Court held (p. 326):

> "* * * As a result, the deposit became the property of the Soviet Government, and so remained until November 16, 1933, at which time the Soviet Government released and assigned to petitioner all amounts due to that government from American nationals, including the deposit account of the corporation with Belmont. * * *"

In discussing the public policy of the United States, the Court there held that courts of this Country should not sit in judgment on decrees of foreign powers. Once the Soviet was recognized by this Country, the Court said (p. 330):

> "* * * The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. * * *"

There, as here, the defendant was solely a stakeholder, as the Court pointed out at p. 332:

> "* * * The substantive right to the moneys, as now disclosed, became vested in the Soviet Government as the successor to the corporation; and this right that government has passed to the United States. It does not appear that respondents have any interest in the matter beyond that of a custodian. * * *"

It is true there was a compact between Russia and the United States under which the United States took an assignment of the bank account involved from Russia, but it was not the assignment that validated the Soviet decree because the United States could have had no greater right than the Soviet Government had by virtue of the decree of confiscation.

Again, in *United States* v. *Pink* (1942), 315 U.S. 203, this Court gave extraterritorial effect to a Soviet decree of confiscation. That case involved assets in New York of a Russian insurance company which were confiscated by Soviet decrees of 1918 and 1919. The Court below had held that the Soviet decrees had no extraterritorial effect and this Court held to the contrary (p. 217):

> "* * * If that is true, it is decisive of the present controversy. For the United States acquired, under

> the Litvinov Assignment, only such rights as Russia had. * * * If the Russian decrees left the New York assets of the Russian insurance companies unaffected, then Russia had nothing here to assign. * * *"

In the light of these cases it cannot be said that foreign decrees of confiscation have no extraterritorial effect or that the enforcement of them is contrary to public policy.

The purpose of Ordinance No. 23 is to restore to the people of Iraq property that had been wrongfully acquired by the former Dynasty, which purpose has never been held to be contrary to the public policy of this Country.

2. Ordinance No. 23, on the facts of this case, involves a wholly internal matter of the Republic of Iraq—the privilege of a deceased person in Iraq to transmit personal property upon death.

King Faisal II died on July 14, 1958, five days before Ordinance No. 23 was promulgated on July 19, 1958. As to the late King, the effect of the decree is solely to remove the privilege of a deceased to transmit property on death so that no one may inherit.

The transmission of property on death is not a natural right but a privilege which may be altered by the authority which confers it. *Knowlton* v. *Moore* (1899), 178 US 41, 55; *In re Lavine's Will* (1938), 167 Misc. 879.

The transmitting of personal property on death is governed by the law of the domicile of the deceased. *Pfeifer* v. *Wright* (1929), 34 F 2d 690, 691 (ND Okla.); *Chamberlain* v. *Chamberlain* (1870), 43 N.Y. 424, 433; *In re Gifford's Will* (1939), 279 N.Y. 470, 475. This common law rule has been codified in Decedent Estate Law of New York, Section 47.

In refusing to give effect to Ordinance No. 23, the Court below has denied the right of the Republic of Iraq to determine its own law as to whether a domiciliary should have the privilege to transmit personal property upon death.

This is not a question of the extraterritorial effect of Ordinance No. 23, but, rather, giving internal effect in Iraq to its own decree, solely by which distribution of the personal property here of the late King Faisal II is to be determined.

The failure of the Court below to give effect to Ordinance No. 23 is contrary to the principles of the act of state doctrine established by this Court.

In *Oetjen* v. *Central Leather Company* (1918), 246 US 297, 303, 304, this Court said:

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "

See also *Underhill* v. *Hernandez* (1897), 168 US 250, 252; *Ricaud* v. *American Metal Co.* (1918), 246 US 304, 309; *Banco Nacional de Cuba* v. *Sabbatino* (1964), 376 US 398.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
Leo C. Fennelly,
Edward P. F. Eagan,
Attorneys for Petitioner.

December 17, 1965.

APPENDIX A.

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 102—September Term, 1965.

(Argued October 1, 1965 Decided November 8, 1965.)

Docket No. 29817

REPUBLIC OF IRAQ,

Appellant,

v.

FIRST NATIONAL CITY BANK, as Administrator of the Goods, Chattels and Credits of His Majesty King Faisal II Ibn Ghazi Ibn Faisal I of Iraq, deceased,

Appellee.

Before:

FRIENDLY and KAUFMAN, Circuit Judges, and HERLANDS, District Judge.*

Appeal from a judgment of the District Court for the Southern District of New York, Edward C. McLean, Judge, 241 F. Supp. 567 (1965), dismissing a complaint wherein the Republic of Iraq sought to recover a bank account and stock held in a custodian account in New York by the late King Faisal II. Affirmed.

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* Of the Southern District of New York, sitting by designation.

Appendix A.

LEO C. FENNELLY (Fennelly, Douglas, Eagan, Nager & Voorhees, New York, N. Y.; Edward P. F. Eagan, of Counsel), for Appellant.

WOODSON D. SCOTT (Lord, Day & Lord, New York, N. Y.), for Appellee.

FRIENDLY, Circuit Judge:

King Faisal II of Iraq was killed on July 14, 1958, in the midst of a revolution in that country, which led to the establishment of a republic, recognized by the United States in August. On July 19, 1958, the new government issued Ordinance No. 23 which decreed that "all property [of the dynasty] . . . whether moveable or immoveable . . . should be confiscated."[1] At the time of his death King Faisal had a balance of $55,925 and 4,008 shares of Canada General Fund, Ltd., a Canadian investment trust, in deposit and custody accounts with Irving Trust Company in New York. In October 1958, the Surrogate's Court for New York County issued to the defendant letters of administration with respect to King Faisal's New York assets. During that month the Consul General of the Republic of Iraq notified Irving Trust that the Republic claimed all assets of King Faisal by virtue of Ordinance No. 23. Notwithstanding the notice, Irving Trust subsequently transferred to the administrator the balance in the account and certificates for the shares, which were later sold.

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[1] The ordinance included the following preamble:

> It is well known that the Iraqi Ex-dynasty has exerted its influence in Iraq to gain illegal wealth since its inception, as from 23rd August 1921. Consequently, in accordance with the aims of the National Movement that have been achieved by the Iraqi Army supported by the people of Iraq with their consent on 14th July, 1958, for the realization of social justice and putting an end to the illegal exploitation, we issue the following ordinance:—

Appendix A.

In March 1962, the Republic brought this action against the administrator in the District Court for the Southern District of New York to recover the bank balance and the proceeds of the shares. From a judgment dismissing the complaint, 241 F. Supp. 567 (1965), the Republic appeals. We affirm.

The District Court properly held that it had jurisdiction of the action. Under 28 U. S. C. §1332(a) the district courts are vested with original jurisdiction of all civil actions "where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between . . . (2) citizens of a State, and foreign states or citizens or subjects thereof." Although this general language does not grant jurisdiction to probate a will or administer an estate, it has been established by a long series of decisions "that federal courts of equity have jurisdiction to entertain suit 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the custody of the state court." *Markham* v. *Allen*, 326 U. S. 490, 494 (1946), citing *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43 (1909), and other cases.

The principal questions raised in this appeal are the proper definition of the act of state doctrine and its application to foreign confiscation decrees purporting to affect property within the United States. Although difficulty is sometimes encountered in drawing the line between an "act of state" and more conventional foreign decrees or statutes claimed to be entitled to respect by the forum, the Ordinance involved in this case is nowhere near the boundary. A confiscation decree, which is precisely what Ordinance No. 23 purported to be, is the very archetype of an act of state. See ALI, Restatement of Foreign Relations Law of the United States §41c (Proposed Official Draft, 1962) [hereinafter cited as Restatement].

Appendix A.

The Supreme Court has declared that a question concerning the effect of an act of state "must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 423-27 (1964). We deem that ruling to be applicable here even though, as we conclude below, this is not a case in which the courts of the forum are bound to respect the act of the foreign state. Like the traditional application of the act of state doctrine to preclude judgment with respect to another government's acts concerning property within its own territory at the time, see *Underhill* v. *Hernandez,* 168 U. S. 250 (1897); *Oetjen* v. *Central Leather Co.,* 246 U. S. 297 (1918); *Ricaud* v. *American Metal Co.,* 246 U. S. 304 (1918), the exercise of discretion whether or not to respect a foreign act of state affecting property in the United States is closely tied to our foreign affairs, with consequent need for nationwide uniformity. It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice. See *United States* v. *Belmont,* 301 U. S. 324, 331 (1937); *United States* v. *Pink,* 315 U. S. 203, 233-34 (1942). It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other; any such diversity between states would needlessly complicate the handling of the foreign relations of the United States. The required uniformity can be secured only by recognizing the expansive reach of the principle, announced by Mr. Justice Harlan in *Sabbatino,* that all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.[2]

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[2] This law-making power in the federal courts derives by necessary inference from the Constitution itself. Compare Wright, Federal Courts 214 (1963); Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 408 n. 119 (1964); Henkin, The Foreign Affairs Power of the Federal Courts, 65 Colum. L. Rev. 805, 826-30 (1965).

Appendix A.

Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory, see Ehrenzweig, Conflict of Laws §48 at 172 (1962); cf. *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U. S. at 401, 428, 432; when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States." Restatement, §46.

In this case, neither the bank account nor the shares in the Canadian investment trust can realistically be considered as being within Iraq simply because King Faisal resided and was physically present there at the time of his death; in the absence of any showing that Irving Trust had an office in Iraq or would be in any way answerable to its courts, we need not consider whether the conclusion would differ if it did. Cf. *United States* v. *First Nat'l City Bank,* 379 U. S. 378 (1965). So far as appears on this record, only a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue thus was within the United States: although the nationality of King Faisal provided a jurisdictional basis for the Republic of Iraq to prescribe a rule relating to his property outside Iraq, Restatement, §30(1)(b), this simply gives the confiscation decree a claim to consideration by the forum which, in the absence of such jurisdiction, it would not possess—not a basis for insisting on the absolute respect which, subject to the qualifications of *Sabbatino,* 376 U. S. at 428, the decree would enjoy as to property within Iraq at the time.

Extra-territorial enforcement of the Iraqi ordinance as to property within the United States at the date of its promulgation turns on whether the decree is consistent with

our policy and laws.[3] We perceive no basis for thinking it to be. Confiscation of the assets of a corporation has been said to be "contrary to our public policy and shocking to our sense of justice," *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N. Y. 369, 378, 189 N. E. 456, 460 (1934); see also *Zwack* v. *Kraus Bros. & Co.*, 237 F. 2d 255, 259 (2 Cir. 1956) (partnership); *Plesch* v. *Banque Nationale de la République d'Haiti*, 273 App. Div. 224, 77 N. Y. S. 2d 43 (1st Dept.), aff'd, 298 N. Y. 573, 81 N. E. 2d 106 (1948). Confiscation of the assets of an individual is no less so, even if he wears a crown. Compare *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K. B. 140. Our Constitution sets itself against confiscations such as that decreed by Ordinance No. 23 not only by the general guarantees of due process in the Fifth and Fourteenth Amendments but by the specific prohibitions of bills of attainder in Article I. See *United States* v. *Brown*, 381 U. S. 437 (1965), and cases cited therein. It is true that since these provisions are addressed to action by the United States or a state, they might not prevent a court of the United States from giving effect to a confiscatory act of a foreign state with respect to property in the United States. But at least they show that, from its earliest days under the Constitution, this nation has had scant liking for legislative proscription of members of a defeated faction,

[3] It might be argued that, with respect to the shares in the Canadian investment trust, a United States court ought to consider whether a Canadian court would regard the confiscation decree as consistent with the policy of Canada. But, apart from factors tending against such an argument, see Ehrenzweig, *supra*, 84 & n. 52, appellant has not contended that the shares should be treated differently than the bank account, it has presented no evidence as to the attitude of Canada toward foreign confiscations, and although we could take judicial notice of Canadian decisions, see *Siegelman* v. *Cunard White Star Ltd.*, 221 F. 2d 189, 196-97 (2 Cir. 1955), we are not obliged to do so under these circumstances. See *Walton* v. *Arabian American Oil Co.*, 233 F. 2d 541 (2 Cir.), cert. denied, 352 U. S. 872 (1956); B. Currie, Selected Essays on the Conflict of Laws 26-27, 33, 43, 49-50 (1963).

although—or perhaps because—many states, in their dealings with property of the loyalists immediately after the Revolution, had practiced exactly that. See *United States* v. *Brown, supra,* 381 U. S. at 441-46. Foreigners entrusting their property to custodians in this country are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure. In saying this we are not guilty of disrespect to the recitals in the preamble or Ordinance No. 23, see fn. 1; subject to the narrow exception discussed below, the policy of the United States is that there is no such thing as a "good" confiscation by legislative or executive decree.

The only cases cited to us that might seem to suggest a deviation from this view are *United States* v. *Belmont,* 301 U. S. 324 (1937), and *United States* v. *Pink,* 315 U. S. 203 (1942). Language in the latter opinion did indeed lead "some commentators to protest that the Court had laid down the revolutionary doctrine that recognition requires the recognizing state to give extraterritorial effect to all acts of state of the recognized government." Stevenson, Effect of Recognition on the Application of Private International Law Norms, 51 Colum. L. Rev. 710, 720 & n. 54 (1951); see Borchard, Extraterritorial Confiscations, 36 Am. J. Int'l L. 275 (1942); Jessup, The Litvinov Assignment and the Pink Case, *id.* at 282. The facts of the cases, however, required no such overturn of established principles. By the Litvinov agreement our Government had procured, as an incident to recognition, an assignment of the Soviet Union's claims to American assets of nationalized Russian companies, for the benefit of United States nationals whose property in the Soviet Union had been confiscated. Such action of the Chief Executive, taken under his power to conduct the foreign relations of the United States, was considered to make the Soviet confiscation decrees consistent with the law and policy of the United States from that time forward, and, as we now know from *Sabbatino,* federal law controls. See Restatement §46, comment c

and the discussion of *United States* v. *Pink*.[4] In this case, by contrast, nothing remotely resembling the Litvinov agreement is present; on the contrary, the Department of State has disclaimed any interest of the executive department in the outcome of the litigation.[5]

Appellant insists that, however this may be, a New York court would give effect to Ordinance No. 23 because of the New York Decedent Estate Law, §47, which provides:

> Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property [i.e., other than real estate] situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death.

As already indicated, we read *Sabbatino* to mean that New York could not, by application of its choice of law rules, give a foreign act of state an effect, whether less or greater,

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[4] It is also noteworthy that in *Belmont* the dispute was simply between the United States and a debtor of the nationalized Russian company, and in *Pink* between the United States, acting as assignee on behalf of American citizens who had suffered from the Russian confiscations, and foreign creditors. For the importance of the latter factor, see 315 U. S. at 228.

[5] The Deputy Legal Adviser to the Department of State said in a letter dated January 15, 1965, to defendant's counsel:

> While the recognition of and maintenance of diplomatic relations with a foreign government are political matters within the province of the executive department of the Federal Government, questions regarding the administration of estates and the determination of rights and interests in property in the United States ordinarily are matters for determination by the courts of competent jurisdiction. Accordingly, the Department considers that the legal effect of Ordinance No. 23 as it may pertain to title to property in the United States of King Faisal II is a question for determination by the competent United States court.

differing from that dictated by federal law. But appellant's position would be baseless in any event. Not only does §47 refer to the law existing at the time of decedent's death, but no state has been stronger in its opposition to foreign confiscation decree than New York, see, e.g., *Vladikavkaesky Ry.* v. *New York Trust Co., supra; Plesch* v. *Banque Nationale de la République d'Haiti, supra.* Indeed, it was this opposition that required the Supreme Court's intervention in the *Pink* case. We are thus confident that the courts of New York would not strain to read the general language of the Decedent Estate Law to include what on its face is a confiscation decree.

Since the district judge properly concluded the complaint to be lacking in merit, we do not reach the question whether dismissal would have been required in any event on the ground that a prior decree of the Surrogate's Court distributing the assets of the estate operated as *res judicata* despite the sovereign character of the Republic of Iraq and the pendency of this suit. See Restatement §71, comment e.[6]

Affirmed.

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[6] Another district judge had denied, on the ground of sovereign immunity, a motion by defendant to "transfer" this action to the Surrogate's Court, 207 F. Supp. 588 (1962), appeal dismissed for want of jurisdiction, 313 F. 2d 194 (2 Cir. 1963). We know of no authority for such a "transfer"; the utmost relief to which defendant might have been entitled, even as against a private suitor, was a stay of the federal court action pending hearing and determination of the claim by the Surrogate's Court. Cf. *Stansbury* v. *Koss*, 10 F. Supp. 477 (S. D. N. Y. 1931) (Mack, *Cir. J.*).